Supreme Court, U. S.
FILED
DEC 19 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-994

MARTIN L. ALTBAUM,
Petitioner,

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL — STATE OF CALIFORNIA

Harrington, Waddell & Briggs
Patrick J. Briggs
520 West Ash Street, Suite 300
San Diego, California 92101
Telephone: (714) 238-1355

Attorneys for Petitioner

TABLE OF CONTENTS

Page

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATE STATUTES 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 11
CONCLUSION 17
CERTIFICATE 18
APPENDICES

A — Opinion of the Court of Appeal State of California, Fourth Appellate District

B — Denial of Hearing by the Supreme Court — State of California

C — Remittitur

TABLE OF AUTHORITIES

CASES **Page**

Chapman v. California, 386 U.S. 18, 17 L.Ed. 13
2d 705, 87 S.Ct. 824, 24 ALR 3rd 1065
Miranda v. Arizona, (1966) 384 U.S. 436 11,12
16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974
People v. Arnold (1967) 66 Cal.2d 438, 448, ... 12
58 Cal.Rptr. 115, 425 P.2d 515
People v. Boinus, 153 CA 2d 618, 314 P2d 787 15
People v. Boyden, (1953) 116 C.A. 2d 278; 253 15
P.2d 773
People v. Cale, 74 CA 2d 689; 169 P.2d 649 15
People v. Clausen, 120 C 381; 52 P 658 15
People v. Dorado, (1965) 62 Cal. 2d 338, ... 11, 13, 14
398 P.2d 361
People v. Hartridge, 134 CA 2d 659, 286 15
P.2d 72
People v. Kelley, (1967) 66 Cal. 2d 232, 246, ... 12
57 Cal.Rptr. 363, 424 P.2d 947
People v. Merchant, 260 CA2d 875, 67 13
Cal.Rptr459
People v. Reynolds, 149 C.A.2d 290; 308 P.2d 48 15
People v. Scaggs, (1957) 153 C.App.2d 339, ... 15
314 P.2d 793
People v. Stewart, 62 Cal.2d 571, 43 Cal.Rptr. 201, ... 12
400 P.2d 97
People v. Stout, 66 C.2d 184, 57 Cal.Rptr. 152, ... 13
424 P.2d 704
Thompson v. Louisville, (1960) 362 U.S. 199, ... 15
4 L.Ed.2d 654, 80 S.Ct. 624

STATUTES

California Penal Code §496.1 ..... 2, 3, 15
California Penal Code §995 4
California Penal Code §1118.1 10
California Penal Code §1538.5 ..... 3, 4
California Penal Code §12020(a) 3

CONSTITUTIONAL PROVISIONS

United States Code, Title 28 §1257(3) 2
United States Constitution, Amendment V 2
United States Constitution, Amendment XIV 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

MARTIN L. ALTBAUM,
Petitioner,

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL — STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

The Petitioner, MARTIN L. ALTBAUM, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Fourth Appellate District, State of California, entered September 27, 1978.

OPINIONS BELOW

The Court of Appeal, Fourth Appellate District, State of California rendered its opinion on July 25, 1978. A copy of the opinion is attached as Appendix A. The Supreme Court of the State of California denied Petitioner's Petition for a Hearing on September 20, 1978. A copy of said Notice of Denial is attached hereto as Appendix B. The opinion of the Court of Appeal was entered on September 28, 1978. A copy of the Remittitur is attached hereto as Appendix C.

JURISDICTION

On September 28, 1978, the Court of Appeal entered judgment affirming the judgment of the trial court as to Count I. Count I violated California Penal Code §496.1 on March 22, 1977.

The jurisdiction of this Court is involved under Title 28, United States Code, §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was questioned and statements made in violation of the Fifth Amendment?

2. Whether the judgment of conviction was supported by the evidence in violation of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. UNITED STATES CONSTITUTION, AMENDMENT V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. UNITED STATES CONSTITUTION, AMENDMENT XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherin they reside."

STATE STATUTES

CALIFORNIA PENAL CODE SECTION 496.1:

> "Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed two hundred dollars ($200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year."

STATEMENT OF THE CASE

Petitioner was charged in Information No. 40472, Count One with violation of California Penal Code Section 496.1 (receiving stolen property); Count Two charged violation of California Penal Code 12020(a) (possession of sawed-off shotgun). It was also alleged that Petitioner had suffered seven (7) prior convictions on March 29, 1977, for violation of Penal Code Section 496.1 (C.T. 1-2).

Prior to trial, on July 20, 1977, petitioner brought Motions to Suppress Evidence, (California Penal Code Section 1538.5), and to Dismiss the Indictment (California

Penal Code Section 995). (C.T. 11). By Minute Order dated July 21, 1977, the Honorable WILLIAM T. LOW, Judge of the Superior Court, denied Petitioner's Motions brought pursuant to Penal Code Sections 1538.5 and 995. (C.T. 12).

Trial on this matter was held on September 12, 13, 14, 15, 19 and 20, 1977, without jury, the Honorable WILLIAM A. YALE, Judge Presiding. (C.T. 19-24). At the close of the Peoples case Petitioner's Motion for Judgment of Acquittal pursuant to California Penal Code Section 1118.1 was denied as to Count One and granted as to Count Two. (C.T. 23). On September 20, 1977, after hearing closing argument by both parties, Petitioner was found guilty of violation of Penal Code Section 496.1 as charged in Count One. (C.T. 24).

On October 25, 1977, Judge YALE placed Petitioner on probation for a period of three years, however, as a condition of probation ordered Petitioner into the custody of the Sheriff for a period of one year, sentence executed forthwith. (C.T. 25).

At the trial of this matter, witness Irving Aronson was called by the People and testified that sometime between 11:00 a.m. and 6:00 p.m., on April 27, 1976, his residence, located at 730 Country Club Lane, Coronado, California, was burglarized. (Reporter's Transcript, page 7 (hereinafter R.T.)). Mr. Aronson testified that of a total of 26 rings stolen in the burglary, two (2) rings were his. (R.T. 8). The remaining 24 rings belonging to his wife, Agatha Aronson. Mr. Aronson identified People's Exhibit 2 as his gold ring with black onyx stone (R.T. 8-10) stolen in the April 27, 1976, burglary. Mr. Aronson testified that his other ring has never been recovered. (R.T. 14).

Agatha Aronson was called as a witness by the People and testified that she has resided at 730 Country Club Lane, Coronado, California, for nine years (R.T. 15); that on April 27, 1976, she returned home with her husband and discovered her residence had been burglarized. (R.T. 17-18) and 26 rings stolen (R.T. 19, 1. 8). Of the 26 missing rings, two belonged to Mr. Aronson (R.T. 19).

After discovering the theft she contacted the Coronado Police Department and supplied the Police with an appraisal list of the rings. (R.T. 19).

The next time Mrs. Aronson saw any of the stolen rings was on March 13, 1977, while she and her husband were shopping at the Coin Mart store in Chula Vista, California. (R.T. 20). At that time out of a few hundred rings in the store (R.T. 21), she recognized seven (7) of her rings (R.T. 20, 1.26) distributed in different display cases within the Coin Mart (R.T. 21).

Mrs. Aronson called the Coronado Police Department and reported her discovery of the seven rings to Sgt. Hall (R.T. 22) indicating to him on her appraisal list the rings she had seen at the Coin Mart (R.T. 23).

Approximately a week later, Mrs. Aronson returned to the Coin Mart with San Diego County Deputy Sheriffs and Sgt. Hall, and again observed the seven (7) rings (R.T. 23-24). Later Mrs. Aronson accompanied the deputy sheriffs serving a search warrant at the Coin Mart. At that time she identified seven (7) rings for the deputy sheriffs (R.T. 24). Again the store contained, in Mrs. Aronson's estimation, a few hundred rings. (R.T. 26).

Mrs. Aronson identified the following exhibits as rings belonging to her and stolen in the April 23, 1976, burglary:

Exhibit 1 — gold cameo ring (R.T. 28).

Exhibit 3 — gold ring with six colored jadite stones (R.T. 33).

Exhibit 4 — gold and black or blue pearl ring (R.T. 37).

Exhibit 5 — gold ring with 2 gray pearls and 2 diamonds (R.T. 41).

Exhibit 6 — gold ring with cluster of white pearls (R.T. 45).

Exhibit 7 — gold ring with pearl and 2 diamonds (R.T. 49).

On cross-examination, Mrs. Aronson testified that all of the rings she identified as hers had been on public display at the Coin Mart, visible to all parties entering that store.

(R.T. 55). That she had ample time to go through the store and determine that the balance of the rings stolen from her were not located at the Coin Mart. (R.T. 57).

Mrs. Aronson testified she purchased People's Exhibit 4 at FedMart for $30.00 (R.T. 73), that she has seen a lot of rings like Exhibit 4; in fact, on the evening the search warrant was executed, she observed a ring, "... just like it, but just a little larger." (R.T. 73, line 22).

Mrs. Aronson testified that she saw a ring identical to People's Exhibit 2 within the past couple of months (R.T. 75); that she has seen rings similar to People's Exhibit 6 (R.T. 77); that she has seen rings identical to People's Exhibit 7 at a couple of places, and that it is mass-produced (R.T. 78-79); that rings similar to Exhibit 3 (multi-colored jade) are common. (R.T. 79).

The People next called Gary T. Fisher, Deputy Sheriff, County of San Diego (R.T. 85) who testified he was assigned to the Fencing Detail of the Sheriff's Department (R.T. 86). Deputy Fisher testified that Sgt. R. Hall of the Coronado Police Department contacted him and related that he (Hall) had been contacted by a victim of a burglary (Mrs. Aronson), occurring approximately a year ago, that she related that she knew the whereabouts of some of her stolen property. Sgt. Hall asked Deputy Fisher's assistance in the matter. (R.T. 88-89).

Deputy Fisher testified that Petitioner, MARTIN L. ALTBAUM is the owner of the Coin Mart located at 255 Third Avenue, Chula Vista, California (R.T. 93).

After Deputy Fisher procured a search warrant for a search of the Coin Mart on March 22, 1977 (R.T. 95) he, Mrs. Aronson and nine other officers proceeded to the Coin Mart (R.T. 95-96).

At approximately 4:00 p.m., Deputy Fisher entered the Coin Mart (R.T. 95, l. 19), contacted the Petitioner (R.T. 96, l. 13) and identified himself as a deputy sheriff. (R.T. 97, l. 20-21). Deputy Fisher stated to Petitioner that he was the investigating officer, that he had a search warrant

for the premises and that if Petitioner had any questions, to direct them to Deputy Fisher. (R.T. 98, l. 8-10). Deputy Fisher exited the store and returned with Mrs. Aronson (R.T. 100). Mrs. Aronson entered the store and picked out seven rings she identified as hers (R.T. 100 l. 19-24).

Petitioner indicated to Deputy Fisher that he would be more than glad to cooperate in the investigation. (R.T. 100, l. 8-12). As the seven rings were removed from the display case, Deputy Johnson marked each ring (R.T. Vol. II, 2). After the rings had been removed from the display cases and tried on by Mrs. Aronson, Deputy Fisher asked Petitioner if he could produce any documents, pawn slips, invoices, bills of lading, receipts or any documents that could substantiate his ownership of these particular rings or how they came into his possession. (R.T. Vol. II 6).

Over objection of defense counsel that Petitioner's response to Deputy Fisher's question would be hearsay if not an admission, or in the alternative, made without an admonishment of constitutional rights (R.T. Vol. II, 7), the Court allowed Deputy Fisher to testify that Petitioner said he did have evidence of ownership and that the documents were in the possession of his attorneys. (R.T. Vol. II, 8).

Petitioner, after receiving permission, called his attorneys, who subsequently arrived at the Coin Mart. (R.T. Vol. II, 8).

During voir dire examination, on the issue of whether a Miranda admonishment should have been given Petitioner prior to eliciting any statements regarding how Petitioner had come into possession of the rings, Deputy Fisher testified that: "he possessed a search warrant for the Coin Mart on March 22, 1977, when he entered that store (R.T. Vol. II, 20); he knew Petitioner had just stood trial and had been convicted of receiving stolen property (R.T. Vol. II, 21); the victim, Mrs. Aronson had identified property at the Coin Mart (seven rings), she believed to have been stolen in a burglary of her residence on April 27, 1976 (R.T. Vol. II, 23); the rings identified by Mrs. Aronson matched

the victim's appraisal list in Deputy Fisher's possession (R.T. Vol. II, 26); Deputy Fisher had a very strong suspicion that the rings seized belonged to Mrs. Aronson (R.T. Vol. II) and that Petitioner was in possession of stolen property (R.T. Vol. II, 26, 1. 14; 26 1. 4); further, Deputy Fisher entered the Coin Mart with nine (9) other Police Officers (R.T. Vol. II, 40).

Over further objection of defense counsel that a Miranda admonishment should have been given Petitioner (R.T. Vol. II, 66-74), or that the testimony if not an admission, was hearsay (R.T. Vol. II, 77) Fisher was permitted to testify that: Petitioner showed him an invoice (People's Exhibit 20) showing ownership of People's Exhibit 3 (multi-colored jade ring) (R.T. Vol. II, 75); that Petitioner said that People's Exhibit 3 was a new ring which had come into the store on April 23, 1976 (R.T. Vol. II, 77); Petitioner produced a cash receipt dated January 28, 1976, from the Department of Treasury, U.S. Customs Service (People's Exhibit 21 — R.T. Vol. II, 80) which listed 1,139 pieces of assorted gold jewelry, rings, bracelets, metals, broaches and miscellaneous pieces and indicated that People's Exhibit 1 was contained in that purchase. (R.T. Vol. II, 50). Petitioner indicated that, ". . . he's purchased quite a large quantity of jewelry from these auctions, and that it was his belief that the reason it happened to be in that particular auction was that possibly it was there because it did not have any "K" marking to denote the quality of the gold in the ring, and so he stated to me that's why Customs seized the ring." (R.T. Vol. II, 7-12); Petitioner stated people's Exhibit 2 had been in his store for over a year and a half, that he didn't have a written invoice and did not know how the ring came to be in his store (R.T. Vol. II, 83); Petitioner did not produce any papers showing ownership of People's Exhibit 4 and indicated that he didn't know where it came from or how it happened to be in the store. (R.T. Vol. II, 84). Petitioner said People's Exhibit 6 and 7 possibly could have been part

of the Customs purchase described in People's Exhibit 20 (R.T. Vol. II, 84) because he believed it had been in the store since early 1976 (R.T. Vol. II, 85, 1. 4).

On cross examination, Deputy Fisher testified that 75 to 80 percent of the time Petitioner's Attorney Beccarelli was present during his conversations with Petitioner regarding where Petitioner had obtained the rings. (R.T. Vol. II, 92).

Deputy Fisher observed three to four hundred rings in the show cases of the Coin Mart. (R.T. Vol. II, 99). Petitioner told Deputy Fisher that he has purchased jewelry from Customs, estate sales, other pawn shops, jewelers, wholsesalers and swap meets. (R.T. Vol. II, p. 110-111).

Witness Lynn Carey who has been employed by G. H. Sanders, jewelry store for six years (R.T. Vol. II, 131) was called by the People and testified that: People's Exhibit 1 (cameo ring) is a ring manufactured in any number of similar rings (R.T. Vol. II, 138) and that she has seen such rings in other stores (R.T. Vol. II, 139); People's Exhibit 3 (gold ring with six multi-jade stones) was a common ring that she has seen many of (R.T. Vol. II, 142); People's Exhibit 4 (Fed Mart ring) is a common cast ring (R.T. Vol. II, 140).

Miss Carey testified that if somebody were to bring in the seven rings into her store for either pawn or for the purchase of sale that there was nothing about the rings that would indicate they were stolen or belonged to someone else. (R.T. Vol. II, p. 138-149, 1. 4-7). Miss Carey said the pawn loan price of the seven rings would be less than $200.00.

Edward Benjamin, a stipulated jewelry expert was called by the People and testified that: People's Exhibit 4 and defendant's Exhibit A are almost identical, and that he couldn't tell the difference. (R.T. Vol. II, 169); People's Exhibit 3 and 5 are common rings (R.T. Vol. II, 179); he has sold six or seven dozen rings identical to People's Exhibit 2 (man's black onyx ring) (R.T. Vol. II 180); it's impossible

for a pawn broker just looking at the seven rings to be able to know the ownership of them (R.T. Vol. II, 180-181); if he purchased the seven rings from someone he would pay the same value that a pawn shop would pay, $125.00. (R.T. Vol. II, 183-184); from his personal knowledge of the pawn shop business, the seven rings identified by Mrs. Aronson would be a very insignificant purchase for a pawn shop. (R.T. Vol. II, 185).

At the close of the People's case, Petitioner moved for a judgment of Acquittal pursuant to Penal Code Section 1118 (R.T. Vol. II, 16-30). The Court denied the Motion as to Count I but granted the judgment of Acquittal as to Count II (R.T. Vol. III, 34-35).

Kurt Reichert, an employee at the Coin Mart, was called and testified that during March or April 1976, Petitioner also owned a second pawn shop that was managed by another person. That two or three times a month merchandise, including rings, could be brought from the second store to the Coin Mart in Chula Vista for sale to the public. Further, that this merchandise was not inventoried at the Coin Mart. (R.T. Vol. III, 40). Mr. Reichert testified that the 1,138 pieces of assorted jewelry, represented in People's Exhibit 21 (U.S. Customs receipt) arrived at the Coin Mart in two or three cardboard boxes containing plastic bags and that the items were not inventoried before being put on display for sale. (R.T. Vol. III, 41). There were four to five thousand rings in the Coin Mart on March 22, 1977, of which two thousand were on display. (R.T. Vol. III, 47). Mr. Reichert testified that he had seen the seven rings identified by Mrs. Aronson in the store prior to March 22, 1977, but did not know where they came from, although he very possibly could have purchased them himself. (R.T. Vol. III, 48). During the months of April to December 1976, Petitioner spent a major portion of his time running another business, spending only approximately 1 hour per day at the Coin Mart (R.T. Vol. III, 8-81) while Mr. Reichert was responsible for running

the store (R.T. Vol. III, 48-49). All of the rings were regarded as common by Mr. Reichert. (R.T. Vol. III, 49). Mr. Reichert testified he would give a loan (pawn) on the seven rings of $50.00, and if it were an outright purchase, he would pay $75.00 to a maximum of $100.00 (R.T. Vol. III, 60).

Petitioner's attorney, Anthony S. Beccarelli, testified that he and attorney, Thomas R. Waddell, went to the Coin Mart on March 22, 1977 (R.T. Vol. III, 100). At the Coin Mart, Mr. Beccarelli testified that at no time did he hear Petitioner state to the deputy sheriff that he specifically knew where any of the rings came from (R.T. Vol. III, 104), but that after Petitioner examined the rings he indicated that the rings "possibly" came from U.S. Customs auction because of the lack of "K" markings on some of the rings. (R.T. Vol. III, 104).

After the close of testimony and argument the Court found Petitioner guilty of Count One (Receiving Stolen Property), although the Court indicated that "there is the susceptibility of dual interpretations from the evidence." (R.T. Vol. III, 131-132).

REASONS FOR GRANTING THE WRIT

I

The Decision Of The Court Below Is In Conflict With This Court's Ruling in *Miranda v. Arizona*

Petitioner contended at the time of trial, and now contends that prior to any questioning, Petitioner should have been advised of his "Miranda" rights (*Miranda v. Arizona*, (1966) 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct., 1602; *People v. Dorado*, (1965) 62 Cal.2d 338, 398 P.2d 361), and that any alleged statements made to deputy Fisher should not have been admitted during the trial.

Under *Miranda, supra*, the duty of the police to advise a defendant of his rights arises "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." It was specifically noted by the court that "Our decision is not intended to hamper the traditional function of police officers in investigating crime . . . . In such situations the compelling atmosphere inherent in the process of incustody interrogation is not necessarily present."

In *People v. Arnold*, (1967) 66 Cal.2d 438, 448, 58 Cal.Rptr. 115, 426 P2d 515), the California Supreme Court recognized that custody could occur other than by the physical deprivation of a subject's freedom of action in any significant way. It was there held that custody occurs if a suspect "is led to believe, as a reasonable person," that he is being deprived or restricted of his freedom of action under pressures of official authority. (See *People v. Kelley*, (1967) 66 Cal.2d 232, 246 (57 Cal.Rptr. 363, 424 P2d 947).

In *People v. Kelley, supra*, (at page 245), the Court discussed the practical application of the *Miranda, supra*, rules:

> "The rule is that a confession is inadmissible when at the time it is obtained (1) the investigation no longer is a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect is in custody, (3) the authorities have carried out a process of interrogations that lends itself to eliciting incriminating statements, and (4) the authorities have not effectively informed defendant of his rights to counsel or of his absolute right to remain silent, and no evidence establishes that he has waived these rights." (*People v. Dorado*, 62 Cal.2d 338, 353-354 (42 Cal.Rptr. 169, 398 P.2d 361); *People v. Stewart*, 62 Cal.2d 571 (43 Cal.Rptr. 201, 400 P.2d 97); *Miranda v. Arizona*,

> 384 U.S. 436 (16 L.Ed2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974).
>
> "The second issue, whether defendant was in custody at the time she made the statement, presents the crucial problem of the case. Although we have consistently and expressly held that custody constitutes an essential element of the accusatory stage, we have recognized that custody could occur in a situation in which defendant had not been arrested but his freedom of movement curtailed. In the instant case we are called upon to define more precisely the elements in the curtailment of that freedom of movement . . ."

The admission into evidence of Petitioner's statements was prejudicial error. Self incrimination deemed to have resulted from an improperly received admission does not necessarily require reversal, as distinguished from an improperly admitted confession. (*People v. Stout*, 66 C2d 184, 57 Cal.Rptr. 152, 424 P2d 704). Under a provision of the constitution of California (See Const. Art. VI, Section 13), an appellate court is required to disregard error that is non-prejudicial, (*People v. Merchant*, 260 CA2d 875, 67 Cal.Rptr. 459), and federal rights are concerned if the error is non-prejudicial beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR 3d 1065, reh.den. 386 U.S. 987, 18 L.Ed.2d 241, 87 S.Ct. 1283.). This means that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Stated differently, the reviewing court must determine whether the prosecution has proved beyond a reasonable doubt that the error in receiving the admission in evidence did not contribute to the verdit obtained.

The following facts bring the instant case within the *Miranda, Dorado* rules.

The Deputy Sheriff had been advised by Mrs. Aronson that her stolen jewlery was located at the Coin Mart (R.T. 88-89); Deputy Fisher accompanied Mrs. Aronson to the Coin Mart where she identified seven rings in open display cases as belonging to her (R.T. 23-24); the deputy checked the descriptions of the seven rings with an appraisal list supplied by Mrs. Aronson and they matched said descriptions (R.T. 23); the deputy knew Petitioner was the owner of the Coin Mart (R.T. 93); the deputy knew Petitioner had been arrested and charged with receiving stolen property recently, and was in fact on trial for said offense at that very time (R.T. Vol. II, 20); Deputy Fisher applied for and received a search warrant for the Coin Mart on March 22, 1977 (R.T. 95); Deputy Fisher proceeded to the Coin Mart with Mrs. Aronson and nine other officers to execute the search warrant (R.T. 95-96); at the Coin Mart, Mrs. Aronson identified the rings, tried them on and they appeared to fit (R.T. Vol. II, 2-3); Petitioner appeared visibly shaken at that time (R.T. Vol. II, 5); Petitioner asked if he could telephone his attorneys (R.T. Vol. II, 8); prior to questioning the Deputy Sheriffs began an extensive search of the Coin Mart in Petitioner's presence (R.T. Vol. II, 40); Deputy Fisher had a strong suspicion that Petitioner was in possession of stolen property (R.T. Vol. II, 26 & 29); that Petitioner was questioned without being admonished of his constitutional rights (R.T. Vol. II, 66-74); there was no testimony that Petitioner was ever told that he was free to leave the Coin Mart.

It clearly appears from the above facts that the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on Petitioner; that the authorities had carried out a process of interrogations that leads itself to eliciting incriminating statements; that Petitioner was, or believed, he was in custody or deprived of his freedom in any significant way; and that Petitioner was not admonished of his constitutional rights prior to making the statements sought to be excluded. (*People v. Dorado, supra.*)

II

The Decision Of The Court Below Is In Violation Of The Fourteenth Amendment

Petitioner contends that there was no evidence to support the finding of the court that Petitioner was guilty of violation of California Penal Code Section 496.1.

The landmark case on the question whether a denial of due process of law inheres in a conviction of crime at the conclusion of a trial is *Thompson v. Louisville,* (1960) 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR 2d 1355. In that case Justice Black, speaking for a unanimous Court, found that a criminal conviction based upon the lack of any evidence violated the due process clause of the United States Constitution.

Petitioner contends that the evidence presented at trial taken as a whole, lacks any evidence sufficient to support his conviction of counts of violation of Penal Code Section 496.1, particularly, that there was no evidence of his "knowledge" that the property was stolen.

A conviction for receiving stolen property cannot withstand appellate scrutiny unless substantial evidence was presented to the trier of fact that (1) the property was received, concealed, or withheld by the accused; (2) such property had been obtained by theft or extortion, and (3) the accused knew that the property had been so obtained. (*People v. Scaggs,* (1957) 153 C.App.2d 339, 314 P2d 793).

Guilty knowledge may be inferred from surrounding conditions and circumstances (*People v. Cale,* 74 CA2d 689; 169 P2d 649; *People v. Boyden,* (1953) 116 C.A.2d 278; 253 P2d 773), such as inadequacy of price, (*People v. Clausen* 120 C381; 52 P658; *People v. Reynolds,* 149 C.A.2d 290, 308 P2d 48), character of the vendor (*People v. Boyden, supra; People v. Boinus,* 153 CA2d 618, 314 P2d 787), the kind of property, and the time when received (*People v. Hartridge,* 134 CA2d 659, 286 P2d 72).

Essentially, the trial evidence in the instant case can be summed up as follows: Mr. and Mrs. Aronson's residence was burglarized on April 27, 1976, some 26 rings being stolen (R.T. 8); eleven months later, on March 13, 1977, Mrs. Aronson observed only seven of the stolen rings in a pawn shop, known as the Coin Mart, in Chula Vista (R.T. 20); a search warrant was issued for the Coin Mart on March 22, 1977, and executed, seven rings belonging to the Aronson's being seized (R.T. 65); that some two thousand rings were on display at the Coin Mart for sale on March 22, 1977 (R.T. Vol. III, 41); that there was nothing inherent in the rings to suggest they had been stolen (R.T. Vol. II, 180-181); that the seven rings were common types (R.T. Vol. III, 49); that in April to December 1976 Petitioner spent only approximately 1 hour per day at the Coin Mart because he was running another business (R.T. Vol. III, 80-81); three witnesses testified the purchase value of the rings to be less than $200 (Lynn Carey, R.T. Vol. II, 149-150; Edward Benjamin R.T. Vol. II, 183-184; Kurt Reichert R.T. Vol. III, 60); that a purchase of the seven rings in issue would be a very insignificant purchase for a pawn shop (R.T. Vol. III, 185); that Petitioner allegedly stated to Deputy Fisher, without being advised of his constitutional rights, an invoice (People's Exhibit 20) which reflected the purchase of a multi-colored jadite ring that Petitioner believed to be People's Exhibit 3 (R.T. Vol. II, 75); and that Petitioner produced a cash receipt from U.S. Customs (People's Exhibit 21) listing 1,139 pieces of assorted jewelry from which he allegedly told Deputy Fisher People's Exhibit 1 came from (R.T. Vol. II, 50).

To sustain Petitioner's conviction in this case would necessitate the elimination of the element of "guilty knowledge" from the offense of receiving stolen property and instead make it a violation of law merely to be in possession of property that at some point in time was stolen.

CONCLUSION

For the foregoing reasons, the Petitioner, MARTIN L. ALTBAUM, respectfully prays that a Writ of Certiorari issue to review the decision below.

December 14, 1978

HARRINGTON, WADDELL & BRIGGS

By PATRICK J. BRIGGS
PATRICK J. BRIGGS
Attorney for ALTBAUM

MARTIN L. ALTBAUM, Petitioner

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

Attorney:

HARRINGTON, WADDELL & BRIGGS
520 West Ash St., Ste. 300
San Diego, CA 92101
(714) 238-1355

CERTIFICATE OF MAILING

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 520 West Ash Street, Suite 300, San Diego, California 92101.

I served the PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL – STATE OF CALIFORNIA, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively, as follows:

EVELLE J. YOUNGER, Attorney General
110 West A Street, Suite 600
San Diego, California 92101

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California, on DEC 18 1978.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DEC 18 1978 at San Diego, California.

PATRICK J. BRIGGS
PATRICK J. BRIGGS

CERTIFICATE OF MAILING

APPENDIX A

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.
FILED
JUL 25 1978
ERWIN J. TUSZYNSKI, Clerk
DEPUTY CLERK

The People of the State of California
Plaintiff and Respondent,
versus
MARTIN LAWRENCE ALTBAUM,
Defendant and Appellant.

4 Cr. No. 8775
(Sup. Ct. No. CR 40472)

APPEAL from a judgment of the Superior Court of San Diego County. William A. Yale, Judge. Affirmed.

After unsuccessful pretrial motions to suppress evidence (Pen. Code, §1538.5) and to dismiss (Pen. Code, §995), defendant Martin Lawrence Altbaum (Altbaum) waived jury, was tried by the court and found guilty of one count of receiving stolen property (Pen. Code, §496.1). Altbaum was granted three-year's probation conditioned upon one year in custody of the Sheriff of San Diego County.

On appeal he contends (1) he should have been given a *Miranda* (*Miranda v. Arizona*, 384 U.S. 436 [86 S.Ct. 1602]) warning before the police solicited any statements from him; therefore admission of his statements so obtained was prejudicial, and (2) the evidence is insufficient to support his conviction — to show "guilty knowledge."

FACTS

On April 27, 1976, the Coronado residence of Mr. and Mrs. Aronson was burglarized and 26 rings stolen. Most of the rings had been professionally appraised; as a result, the police were given a detailed inventory of the stolen jewelry.

In March 1977, eleven months after the burglary, Mrs. Aronson spotted 7 of the missing rings in showcases at the Coin Mart, the pawn shop, second-hand store Altbaum then operated in Chula Vista. She immediately notified the Coronado police.

On March 22 Deputy Sheriff Fisher accompanied by 9 other law enforcement officers and Mrs. Aronson went to the Coin Mart to execute a search warrant for the stolen property. Fisher identified himself to Altbaum and explained he was there to investigate a year-old burglary and to search for stolen jewelry. Mrs. Aronson pointed out the 7 rings and Altbaum removed them from the display cases. Mrs. Aronson tried on the 7 rings and each in turn fit. Altbaum "appeared to be visibly shaken." Deputy Fisher then asked Altbaum if he could produce any documents, pawn slips, invoices, bills of lading, receipts or other documents that could substantiate his ownership of these particular rings or how he came into their possession. Altbaum said he did have evidence of ownership but the documents were in the possession of his attorneys. Altbaum then telephoned his attorneys and asked them to bring the documents to the Coin Mart. For the next hour while awaiting their arrival, Altbaum moved freely about the store making telephone calls, talking to his employees. No officer was assigned to watch him, no announcement of arrest was made. He was at times out of sight of the police.

When Altbaum's two attorneys arrived, they talked briefly with Deputy Fisher, read the search warrant and then conferred privately with Altbaum several times, at least once outside the store. The search then began with Altbaum and his attorneys cooperating. From this point onward all the police conversation with Altbaum as well as his attempts to substantiate ownership of the 7 rings, verbal and documentary, were in the presence of one or both of his attorneys.

With an attorney aiding, Altbaum showed documents to Fisher purporting to be evidence of purchase of certain of

the rings and gave verbal explanations concerning the characteristics (new or used, gold quality, etc.) of certain of the rings.

These conversations, these efforts by Altbaum to substantiate the ownership by documents precipitated his immediate arrest. He was then given the *Miranda* warnings.

ISSUES

Altbaum asserts before *any* questioning by the police in this fact circumstance he should have been advised of his *Miranda* rights; the police knew he had stolen rings on his premises; when 10 officers appeared at his store with a search warrant, he as a reasonable man could believe his freedom of movement was restricted in a significant way. Therefore he argues he was in "custody" and the *Miranda* warning due.

The duty to give the *Miranda* admonishment arises when (1) the investigation has begun to focus on a particular suspect, (2) the suspect is in custody, and (3) the authorities are about to subject him to a process of interrogation which lends itself to eliciting incriminating statements. *(Miranda v. Arizona, supra,* 384 U.S. 436 [86 S.Ct. 1602]; *People v. Kelley,* 66 Cal.2d 232, 246.) A suspect is in custody when he is led to believe, as a reasonable person, that his freedom of movement is restricted under pressure of official authority. *(People v. Arnold,* 66 Cal.2d 438, 448.)

The *Miranda* rule was prompted by the recognition of the dangers inherent in "incommunicado interrogation of individuals in a police-dominated atmosphere." (*Miranda v. Arizona, supra,* at p. 445.) Its requirement of warning is triggered when the suspect is subject to "custodial interrogation." (*Id* at p. 444, 478.) Thus custody is the critical element. However, every temporary detention — albeit a

species of custody — need not be preceded by the admonishment. There must be a "significant restraint." The point in time when a transitory restraint becomes in any way significant and the warning required was bracketed thus in *People v. Manis*, 268 Cal.App.2d 653, 667:

> "Temporary detention only slightly resembles custody, 'as the mist resembles the rain.'* True enough, a person temporarily detained has been subjected to some restraint and his freedom of movement has been temporarily restricted. But the person detained is in no sense an accused but rather one merely suspected of misconduct. Since the police can make no valid accusation against him, we do not think the process has shifted from investigatory to accusatory [citation], or that an investigation has 'focused on an accused' [citation]. Only when suspicion focuses sharply enough to provide reasonable cause for arrest or charge does the relationship between the police and the person detained become that of accuser and accused."

(See also *People v. Herdan*, 42 Cal.App.3d 300, 310, fn. 17; *People v. Murphy*, 8 Cal.3d 349, 362.)

We conclude the *Miranda* rules do not apply to general on-the-scene investigatory questioning where probable cause to arrest has not yet surfaced. (*People v. Hill*, 12 Cal.3d 731, 767; *People v. Miller*, 71 Cal.2d 459, 480-482.) Possession of stolen property without "guilty knowledge" is not a crime. At the outset of the contact with Altbaum, Deputy Fisher had no factual base for inferring that Altbaum knowingly received or possessed the stolen property. Altbaum may have purchased the property from some legitimate source without knowing it was stolen. The questions Fisher first asked were calculated to elicit

---

*Longfellow: "The Day Is Done."

statements which could exonerate Altbaum. When Altbaum stated his attorneys had the records of ownership, the questioning stopped. The statements made after the attorneys had arrived and in their presence gave rise to probable cause to arrest. As to these latter statements *Miranda* rules do not apply. In *People v. Honeycutt*, 20 Cal.3d 150, 160, the court said:

> "It must be remembered that the purpose of *Miranda* is to preclude police interrogation unless and until a suspect has voluntarily waived his rights *or has his attorney present.*" (Emphasis added.)

Finally, the uncontested facts here warrant our conclusion that Altbaum could not reasonably have believed his freedom was subject to any significant restraint. He moved about, even outside, without hindrance, without supervision by the police. He telephoned and talked to employees. Such restriction is not the custody that triggers the *Miranda* warnings.

Altbaum's next contended the evidence is insufficient to support his conviction. Upon such a challenge, we view the evidence in the light most favorable to the People and presume, as we must, in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Reilly*, 3 Cal.3d 421, 425.) The test is not whether we are convinced upon a reasonable doubt but whether the conclusion of the trier of fact is reasonable, i.e. whether it is supported by substantial evidence. (*People v. Reyes*, 12 Cal.3d 486, 496-497.) The testimony of Mrs. Aronson and Deputy Fisher established beyond doubt the first two elements of the offense: Altbaum's possession of the stolen property. One element remained to be proved — that Altbaum knew the property was stolen. (*People v. Vann*, 12 Cal.3d 220, 224.) Such state of mind may be shown by circumstantial evidence.

Altbaum's guilty knowledge could reasonably be inferred from these circumstances: (a) When Mrs. Aronson

placed the rings on her finger and each in turn fit, Altbaum was "visibly shaken." This without doubt described conduct is ambiguous and its weight questionable, but this is for the trier of fact to evaluate; (b) Altbaum showed a document to Deputy Fisher as proof of his ownership of a ring. Competent evidence contradicted Altbaum's assertion. The invoice was not for that ring; (c) Altbaum told the police certain of the rings were new. Competent evidence indicated the rings were worn — used; (d) Altbaum said he obtained three of the rings from a United States Customs auction. He, however, had no invoice except one covering 1139 pieces of assorted jewelry; (e) Despite his efforts, aided by his counsel, Altbaum produced no documentary evidence whatsoever of title to any of the 7 stolen rings. Therefore his first representation that he had documents of title was false; (f) In the record producing effort there appears a glaring void. Altbaum lacked inventory records, acquisition records, cost records, absolutely essential for tax purposes as well as for his ordinary accounting needs as a business man needing to know his profit or loss status. Altbaum's conduct, his arguably false statements, his tendering of, reliance upon inapplicable documents of ownership, his total lack of business records, add, in sum to substantial evidence warranting the trial court's conclusion that Altbaum possessed the required guilty knowledge.

Judgment affirmed.

J. Staniforth

WE CONCUR:

P. J. Brown

J. Cologne

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 20 1978

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 8775

People

vs.

Altbaum

Respectfully,

G. E. BISHEL
Clerk

97371-877 1-78 3M OSI

APPENDIX C

IN THE

Court of Appeal, Fourth Appellate District
State of California

DIVISION ONE

4 Crim. No. 8775

FILED
Robert D. Zumwalt, Clerk
SEP 27 1978
BY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

VS.

MARTIN LAWRENCE ALTBAUM,

Defendant and Appellant.

REMITTITUR

SUPERIOR COURT No. CR 40472

COUNTY OF San Diego

ROBERT L. FORD

I, [redacted], Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on July 25, 1978 *and this opinion or decision has now become final.* Judgment affirmed.

ENTERED

SEP 27 1978

1180 289

Judgment Book ___ Pg. ___

WITNESS my hand and seal of the Court this September 25, 1978.

ROBERT L. FORD
[redacted], *Clerk*

By Wheeton
Deputy

see

7 8

9 9 5